
BONA FIDE NEED – TERMS AND BUSINESS RULES

Antideficiency Act (ADA)

- One of the major laws through which Congress exercises constitutional control of the public purse. Some of its prohibitions include: making or incurring overobligation or overexpenditure from an appropriation, apportionment, or formal subdivision thereof (i.e., allotment or suballotment, if issued, under NASA Fund Control Regulations); making or incurring expenditures or obligations in advance of an appropriation unless authorized by law; and accepting voluntary services unless authorized by law. Additional restrictions include: only using an appropriation for its intended purpose and, for appropriations made for a definite period (e.g., two-year funds), only using the appropriation for expenses and obligations properly incurred during that time (“bona fide needs” rule). ADA constraints apply to all phases of an appropriation's life cycle.
(NPR 9470.1)

CITATIONS:

“one of the major laws through which Congress exercises its constitutional control of the public purse.”
(GAO's *"Antideficiency Act Background"*)

(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law

(31 U.S.C. § 1341(a)(1)(A)&(B))

(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding—

(1) an apportionment; or

(2) the amount permitted by regulations prescribed under section 1514 (a) of this title.

(31 U.S.C. § 1517(a))

Administrative division of apportionments

...subject to the approval of the President, the head of each executive agency (except the Commission) shall prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system shall be designed to—

(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and

(2) enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

(31 U.S.C. § 1514(a))

D.5.1 Funds appropriated to meet NASA's resource requirements shall be apportioned at the Agency level, allotted at the mission level, and suballotted at the theme level in accordance with the AEP, but always within and in accordance with any controls established in the appropriation and apportionment. Funding targets will be allocated below the suballotment level to facilitate program execution and business operations.

(NPR 9470.1, Attachment D, "NASA Fund Control Regulations")

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.

(31 U.S.C. § 1342)

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

(31 U.S.C. § 1301(a))

(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title.

(31 U.S.C. § 1502(a))

Bona Fide Need

- An appropriation or fund limited for obligation to a definite period [typically two years for most NASA projects] is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made and obligated within the period of availability. That is, the obligation must be to satisfy a need of the agency that arose during the period of availability (with certain limited exceptions) and must meet the purpose and availability of funds established in the appropriation. (*NPR 9470.1*)

CITATIONS:

(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title.
(*31 U.S.C. § 1502(a)*)

Documentary evidence requirement for Government obligations
(*31 U.S.C. § 1501*)

Additional discussion
(*Principles of Federal Appropriations Law, Chapter 5.B.*)

Budget Authority

- The authority to incur financial obligations that will result in outlays. The basic four forms are appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. NASA only has appropriation and spending authority.

CITATIONS:

Budget authority (BA) means the authority provided by law to incur financial obligations that will result in outlays. Specific forms of budget authority include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections.
(*OMB Circular No. A-11, Section 20.4(a)*)

Budget authority is the authority to incur financial obligations that will result in outlays. When the Agency apportions, allots, or further distributes funds through the funds distribution process, it is delegating budget authority down to the organizational level that will execute it...
There are four basic forms of budget authority: appropriations,

borrowing authority, contract authority, and spending authority from offsetting collections. NASA only has appropriations and spending authority from offsetting collections. Both reimbursable funds and the Working Capital Fund use spending authority. (NPR 9470.1)

Authority provided by law to enter into obligations that will result in outlays of Federal funds. Budget authority may be classified by the period of availability (one-year, multiyear, no-year), by the timing of congressional action (current or permanent), or by the manner of determining the amount available (definite or indefinite). (Senate.gov glossary)

(A) In general.— The term “budget authority” means the authority provided by Federal law to incur financial obligations, as follows:

- (i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;
- (ii) borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;
- (iii) contract authority, which means the making of funds available for obligation but not for expenditure; and
- (iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority. (2 U.S.C. § 622)

Budget authority is a general term referring to various forms of authority provided by law to enter into financial obligations that will result in immediate or future outlays of government funds. As defined by the Congressional Budget Act, “budget authority” includes: “(i) provisions of law that ...” (Principles of Federal Appropriations Law, Chapter 2.A.2.)

Budget Authority Phases

- There are three phases to a budget authority's life cycle: Unexpired, Expired, and Canceled. Only during the Unexpired Phase (current/available period) may "new" obligations be made. The Unexpired Phase is the time period during which budget authority is available for incurring "new" obligations and lasts for the number of years provided in the appropriations (one year, two year, etc.). No-year authority lasts indefinitely.

CITATIONS:

Under a general law, annual budget authority and multi-year budget authority may disburse during the first two phases of the following three phases that make up the life cycle of the budget authority.

Unexpired phase. During this time period the budget authority is available for incurring "new" obligations. You may make "new" grants or sign "new" contracts during this phase and you may make disbursements to liquidate the obligations. This phase lasts for a set number of years. Annual budget authority lasts for up to one fiscal year. Multi-year authority lasts for longer periods, currently from over one fiscal year up to 15 fiscal years, and no-year authority lasts indefinitely.

Expired phase. During this time period, the budget authority is no longer available for new obligations but is still available for disbursement. This phase lasts five years after the last unexpired year unless the expiration period has been lengthened by legislation. Specifically, you may not incur new obligations against expired budget authority, but you may liquidate existing obligations by making disbursements.

Canceled phase. After the last expired year, the account is closed, and the balances are canceled. The authority to disburse is canceled and is no longer available for any purpose. Any offsetting collections credited to the account at the time the account is canceled or subsequently must be transferred to miscellaneous receipts in the Treasury. Any old bills with valid obligations that show up after the account is closed must be obligated against and disbursed from budget authority that is available for the same general purpose but still in the unexpired phase. For example, an old bill from obligations incurred against an FY 2001 annual salaries and expense (S&E) account that arrives after the authority is canceled must be obligated and disbursed against the corresponding FY 2007 annual S&E account.

(OMB Circular No. A-11, Section 20.4(c))

Contract

- An agreement creating obligations enforceable by law. The basic elements of a contract are mutual assent, consideration, capacity, and legality. At NASA, the term is often used to refer to both public contracts and Space Act Agreements, although the agreements are executed under other transaction authority and are distinguished from contracts in law and by GAO.

CITATIONS:

An agreement creating obligations enforceable by law. The basic elements of a contract are mutual assent, consideration, capacity, and legality.

(Cornell Legal Information Institute)

An *other transaction* (OT) is a special vehicle used by federal agencies for obtaining or advancing research and development (R&D) or prototypes. An OT is not a contract, grant, or cooperative agreement, and there is no statutory or regulatory definition of “other transaction.”

(CRS Report for Congress: Other Transaction (OT) Authority)

In April 2000, we reported on the Department of Defense’s (DOD) use of Section 845 agreements, also referred to as “other transactions” for prototype projects. These are transactions other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.

(GAO Report 03-150)

Under the Competition in Contracting Act of 1984 and GAO’s Bid Protest Regulations, GAO will not review the issuance of Space Act agreements pursuant to agency’s “other transactions” authority, because the issuance of the Space Act agreements pursuant to that authority was not tantamount to the award of contracts for the procurement of goods and services and was, therefore, outside GAO’s bid protest jurisdiction.

(GAO Report B-298804)

without regard to section 3324 (a) and (b) of title 31, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration

(42 U.S.C. § 2473(c)(5))

(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States

Government may not be more than the value of the service already provided or the article already delivered.

(b) An advance of public money may be made only if it is authorized by...

(31 U.S.C. §3324)

**Cooperative
Agreement or Grant**

- A federal financial assistance award making payment in cash or in kind for a specified purpose. For a grant, NASA is not expected to have substantial involvement with recipient (the state or local government or other entity) while the contemplated activity is being performed. For a cooperative agreement, NASA is expected to have substantial involvement with recipient while the contemplated activity is being performed.

(NPR 9470.1)

CITATIONS:

Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, loans, loan guarantees, property (including donated surplus property), cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, and other assistance, but does not include amounts received as reimbursement for services rendered to individuals

(OMB Circular No. A-133)

An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

(31 U.S.C. § 6304)

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of

value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.
(31 U.S.C. § 6305)

Cost Accruals

- “NASA’s accounting records are maintained on an accrual basis, i.e., revenues are recorded in the accounts when earned and expenses are recorded when incurred, even though disbursements and collections are not recorded until funds are paid and collected. Use of the accrual method is mandated by” law.
(NPR 9060.1, Section 1.1.1)

CITATIONS:

The term “accrual” is used in this document to refer to an accounting transaction to record expenses that have been incurred or revenues that have been earned without regard to when cash is received or disbursed.
(FSIO’s FMLoB Glossary)

To assist in preparing a cost-based budget under section 1108 (b) of this title and consistent with principles and standards the Comptroller General prescribes, the head of each executive agency shall maintain the accounts of the agency on an accrual basis to show the resources, liabilities, and costs of operations of the agency. An accounting system under this subsection shall include monetary property accounting records.
(31 U.S.C. § 3512(e))

Economy Act Agreement

- An agreement to obtain goods or services from another agency or major unit of the same agency, under the terms of 31 U.S.C. § § 1535. The amount obligated must be deobligated to the extent that the performing agency/unit has not incurred obligations before the end of the period of availability of the ordering appropriation and set agreement period of performance. Funds may not be obligated by the performing agency after the ordering agency’s appropriation expires and set agreement period of performance. (NPR 9470.1)

CITATIONS:

(a) The head of an agency or major organizational unit within an

agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—

- (1) amounts are available;
- (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
- (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and
- (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise... ///

(d) An order placed or agreement made under this section obligates an appropriation of the ordering agency or unit. The amount obligated is deobligated to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation, in—

- (1) providing goods or services; or
- (2) making an authorized contract with another person to provide the requested goods or services.

(31 U.S.C. § 1535)

Forward Funding

- (1) Budget authority that is made available for obligation beginning in the last quarter of the fiscal year for the financing of ongoing activities (usually grant programs) during the next fiscal year. This funding is used mostly for education programs, so that obligations for grants can be made prior to the beginning of the next school year. The budget records the budget authority in the fiscal year in which it is appropriated. For example, the following language, if it appeared in an appropriation act for 2007, would provide forward funding: "... of which \$2,000,000 shall become available on July 1, 2007 and shall remain available through September 30, 2008 for academic year 2007–2008." (2) NASA sometimes uses this term to refer to incurring any obligation to cover a bona fide need for the following fiscal year using current year funds that would have carried over and remained available in the following fiscal year. (NPR 9470.1)

CITATIONS:

Budget authority that is made available for obligation beginning in the last quarter of the fiscal year for the financing of ongoing activities (usually grant programs) during the next fiscal year. This funding is used mostly for education programs, so that obligations for grants can be made prior to the beginning of the next school year.
(GAO's "A Glossary of Terms Used in the Federal Budget Process")

Forward funding means appropriations of budget authority that become available for obligation in the last quarter of the fiscal year for the financing of ongoing grant programs during the next fiscal year. (See section 20.4(c).) ///

Forward funding means appropriations of budget authority that are made available for obligation in the last quarter of the fiscal year for the financing of ongoing grant program during the next fiscal year. The budget records the budget authority in the fiscal year in which it is appropriated. The following language, if it appeared in an appropriation act for 2007, would provide forward funding, which would be recorded in fiscal year 2007: "... of which \$2,000,000,000 shall become available on July 1, 2007 and shall remain available through September 30, 2008 for academic year 2007–2008."

(OMB Circular No. A-11, Section 20.4(c))

**Incrementally
Funded Contract**

- A contract in which the total work effort is performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance. This funding method allows for contracts to be awarded for periods in excess of one-year, even though the total estimated amount of funds to be obligated for the contract is not available at the time of contract award. An agreement to pay “special termination” costs under an incrementally funded contract creates a firm obligation, not a contingent liability, to pay the contractor because the contracting agency remains liable for the costs even if it decides not to fund the contract further. This obligation remains until the contract is fully funded.

CITATIONS:

An incrementally funded contract is a contract in which the total work effort is performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance. This funding method allows for contracts to be awarded for periods in excess of one-year, even though the total estimated amount of funds to be obligated for the contract is not available at the time of contract award.

(U.S. Army Corps of Engineers, Office of the Principal Assistant Responsible for Contracting (OPARC)) [hyperlink not available – document provided upon request]

An agreement to pay “special termination” costs under an incrementally funded contract creates a firm obligation, not a

contingent liability, to pay the contractor because the contracting agency remains liable for the costs even if it decides not to fund the contract further.

(Principles of Federal Appropriations Law, Chapter 6.C.2.b.(3))

With regard to the new termination provision, Air Force officials state that since the Air Force may never have to pay the "special termination" costs, the new clause creates a contingent liability which does not constitute an obligation. We disagree. The "special termination" costs cannot be viewed as a contingent liability. Until the Air Force fully funds the contract, the Air Force has a firm obligation to pay Eaton \$13.5 million over and above whatever amount the Air Force has incrementally committed to the contract. In other words, should the Air Force decide not to further incrementally fund the contract, the Air Force remains liable to Eaton for \$13.5 million.

(GAO Report B-238581)

**Indefinite-Delivery/
Indefinite-Quantity
Contract**

- A form of an indefinite-quantity contract under which the agency may place orders at any time during a fixed period; actual delivery dates during that period are undefined in the contract. The contract obligates the government only to order the minimum quantity of supplies or services, and that minimum amount is recorded as an obligation when the contract is executed, against the appropriation current at that time.

CITATIONS:

An IDIQ contract is a form of an indefinite-quantity contract. An indefinite-quantity contract provides for an indefinite quantity of supplies or services, within stated limits, during a fixed period. 48 C.F.R. 16.504(a). *See also Mason v. United States*, 442, 615 F.2d 1343, 1346, n.5 (Ct. Cl. 1980), *cert. denied* 449 U.S. 830 (1980); Cheryl Lee Sandner and Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 Pub. Cont. L. J. 3, 461 (2001). Although the quantity is indefinite, an IDIQ contract must require the government to order, and the contractor to furnish, at least a stated minimum quantity of supplies or services. FAR 16.504(a). If additional amounts above the minimum are ordered, the contractor must furnish any additional quantities, but not to exceed the stated maximum. *Id.* Also, while the agency may place orders at any time during a fixed period, actual delivery dates during that period are undefined.

(GAO Report B-302358)

(a) *Description.* An indefinite-quantity contract provides for an

indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum.

(FAR 16.504(a))

GAO determined that a Bureau of Customs and Border Protection procurement constituted an “indefinite-delivery, indefinite-quantity” (IDIQ) contract that was not subject to FASA. The decision explained that, unlike a contract covered by FASA, an IDIQ contract does not obligate the government beyond its initial year. Rather, it obligates the government only to order a minimum amount of supplies or services. The cost of that minimum amount is recorded as an obligation against the appropriation current when the contract is entered into.

(Principles of Appropriations Law, Chapter 6.C.2.b.(4))

Indefinite-Quantity Contract

- A contract that provides for an indefinite quantity of supplies or services, within stated limits, during a fixed period. The contractor is required to furnish at least a stated minimum quantity of supplies or services and, if ordered, additional amounts above the minimum, not to exceed the stated maximum.

CITATIONS:

(a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum.

(FAR 16.504(a))

An *indefinite-quantity contract* is one in which the contractor agrees to supply whatever quantity the government may order, within limits, with the government under no obligation to use that contractor for all of its requirements.

(Principles of Federal Appropriations Law, Chapter 7.B.1.e.)

An indefinite-quantity contract provides for an indefinite quantity of supplies or services, within stated limits, during a fixed period. 48 C.F.R. 16.504(a). *See also* *Mason v. United States*, 442, 615 F.2d 1343, 1346, n.5 (Ct. Cl. 1980), *cert. denied* 449 U.S. 830 (1980); Cheryl Lee Sandner and Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 Pub. Cont. L. J. 3, 461 (2001). Although the quantity is indefinite, an IDIQ contract must require the government to order, and the contractor to furnish, at least a stated minimum quantity of supplies or services. FAR 16.504(a) . If additional amounts above the minimum are ordered, the contractor must furnish any additional quantities, but not to exceed the stated maximum.
(GAO Report B-302358)

Additional discussion.
(*Principles of Federal Appropriations Law, Chapter 6.C.2.b.(3)*)

**Inventory
(maintaining)**

- Agencies normally maintain inventories of common use items. The bona fide needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the “need” being to maintain the inventory level so as to avoid disruption of operations. The problem arises when the inventory crosses the line from reasonable to excessive.
(*Principles of Federal Appropriations Law, Chapter 5.B.1.b.*)

**Multiple Year
Contract**

- A contract having a term of more than one year, regardless of fiscal year funding. FAR Part 22 indicates that this includes multiyear contracts, although FAR Part 17 and the Principles of Federal Appropriations Law provide criteria to distinguish between the two.

CITATIONS:

"Multiple year contracts" means contracts having a term of more than 1 year regardless of fiscal year funding. The term includes multiyear contracts (see 17.103).
(FAR 22.1001)

"Multi-year contract" means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing

difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first.
(*FAR 17.103*)

A contract for the needs of the current year, even though performance may extend over several years, is not a multiyear contract. We discuss contracts such as these, where performance may extend beyond the end of the fiscal year, in sections B.4 and B.5 of this chapter. Thus, a contract to construct a ship that will take 3 years to complete is not a multiyear contract; a contract to construct one ship a year for the next 3 years is.
(*Principles of Federal Appropriations Law, Chapter 5.B.8.a.*)

It is critical in this case to distinguish between "multiyear contracting" and "multiple year contracts." The unfortunate partial homonymy of the terms "multiyear" and "multiple year" evidently led to confusion both at Customs and at OIG and is the essential origin of the current dispute. The term "multiple year contracts" is commonly used to refer to contracts that extend beyond one year. It includes multiyear contracts, such as those authorized by section 254c, obligating the government for future years. It may also include contracts that extend for more than one year, but do not obligate the government beyond the initial year. This distinction is explained in FAR Part 17:

"The key distinguishing difference between multiyear contracts and multiple year contracts is that multiyear contracts, defined in the statutes cited at 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first."
(*GAO Report B-302358*)

Multiyear Contract

- A contract covering the needs or requirements of more than one fiscal year without establishing and having to exercise an option for each program year after the first. The multiyear contract may cover no more than five program years. 10 U.S.C. § 2306b & c set forth the criteria that NASA's multiyear contracts must meet, and the Principles of Appropriations Law provide the following example to help in determining whether a contract is or is not "multiyear": "A contract for the needs of the current year, even though performance may extend over several years, is not a multiyear contract... Thus, a contract to construct a ship that will

take 3 years to complete is not a multiyear contract; a contract to construct one ship a year for the next 3 years is.”

CITATIONS:

"Multi-year contract" means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first.
(*FAR 17.103*)

A multiyear contract, as we use the term in this discussion, is a contract covering the requirements, or needs, of more than one fiscal year. A contract for the needs of the current year, even though performance may extend over several years, is not a multiyear contract. We discuss contracts such as these, where performance may extend beyond the end of the fiscal year, in sections B.4 and B.5 of this chapter. Thus, a contract to construct a ship that will take 3 years to complete is not a multiyear contract; a contract to construct one ship a year for the next 3 years is.
(*Principles of Federal Appropriations Law, Chapter 5.B.8.a.*)

Multiyear contracting is a special authority for acquiring more than one year's requirements—including weapon systems—under a single contract award without having to exercise an option for each program year after the first.
(*GAO Report GAO-08-298*)

(a) In General.— To the extent that funds are otherwise available for obligation, the head of an agency may enter into multiyear contracts for the purchase of property whenever the head of that agency finds each of the following:

- (1) That the use of such a contract will result in substantial savings of the total anticipated costs of carrying out the program through annual contracts.
- (2) That the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate,

procurement rate, and total quantities.

(3) That there is a reasonable expectation that throughout the contemplated contract period the head of the agency will request funding for the contract at the level required to avoid contract cancellation.

(4) That there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive.

(5) That the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(6) In the case of a purchase by the Department of Defense, that the use of such a contract will promote the national security of the United States.

(7) In the case of a contract in an amount equal to or greater than \$500,000,000, that the conditions required by subparagraphs (C) through (F) of paragraph (1) of subsection (i) will be met, in accordance with the Secretary's certification and determination under such subsection, by such contract. ///

(k) Multiyear Contract Defined.— For the purposes of this section, a multiyear contract is a contract for the purchase of property for more than one, but not more than five, program years. *(10 U.S.C. § 2306b)*

(a) Authority.— Subject to subsections (d) and (e), the head of an agency may enter into contracts for periods of not more than five years for services described in subsection (b), and for items of supply related to such services, for which funds would otherwise be available for obligation only within the fiscal year for which appropriated whenever the head of the agency finds that—

(1) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;

(2) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(3) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.

(b) Covered Services.— The authority under subsection (a) applies to the following types of services:

(1) Operation, maintenance, and support of facilities and installations.

(2) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment.

(3) Specialized training necessitating high quality instructor skills

(for example, pilot and air crew members; foreign language training).

(4) Base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal).

(5) Environmental remediation services for—

(A) an active military installation;

(B) a military installation being closed or realigned under a base closure law; or

(C) a site formerly used by the Department of Defense...

(f) Multiyear Contract Defined.— For the purposes of this section, a multiyear contract is a contract for the purchase of services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

(10 U.S.C. § 2306c)

Additional discussion.

(*Principles of Federal Appropriations Law, Chapter 6.C.2.b.(4)*)

**Nonseverable
(Entire) Service**

- (1) A service that, by its nature, cannot be separated for performance in separate fiscal years. The service involves work which cannot be separated into components for performance in different fiscal years, but constitutes a specific, entire job with a defined end product that must be performed as a single task to meet a need of the government. The entire contract price should be charged to the fiscal year appropriation current at the time the contract was made, notwithstanding that performance may extend into future fiscal years. A limitation of funds clause does not affect the applicable bona fide needs rule and the severable test. (2) Training tends to be nonseverable. Thus, where a training obligation is incurred in one fiscal year, the entire cost is chargeable to that year, regardless of the fact that performance may extend into the following year.

CITATIONS:

“Nonseverable services” – services which constitute a specific, entire job with a defined endproduct that cannot feasibly be subdivided for separate performance in each fiscal year, essentially a single undertaking which, by its nature, cannot be separated for performance in separate fiscal years. Contracts for nonseverable services should be financed entirely out of the appropriation

current at the time of award, notwithstanding that performance may extend into future years. Examples of nonseverable services are studies, reports, overhaul of an engine, painting a building, etc. (*Uscourts.gov's JP3 Glossary of Terms*)

The Comptroller General has held that the question of whether to charge the appropriation current on the date the contract is made, or to charge funds current at the time the services are rendered, depends upon whether the services are “severable” or “entire”... A contract that is viewed as “entire” is chargeable to the fiscal year in which it was made, notwithstanding that performance may have extended into the following fiscal year. The determining factor for whether services are severable or entire is whether they represent a single undertaking ///

...(subsequent modifications to Fish and Wildlife Service research work orders should be charged to the fiscal year current when the work orders were issued since the purpose of the research is to provide a final research report and the services under the contract are nonseverable).The last opinion is noteworthy because it pointed out that a limitation of funds clause does not affect the application of the *bona fide* needs rule and the severable test. 73 Comp. Gen. at 80. ///

Training tends to be nonseverable. Thus, where a training obligation is incurred in one fiscal year, the entire cost is chargeable to that year, regardless of the fact that performance may extend into the following year.

(*Principles of Appropriation Law, Chapter 5.B.5.*)

where the services provided constitute a specific, entire job with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year, the task should be financed entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future fiscal years. See 71 Comp.Gen. 428. The bona fide need rule allows time-limited funds to be used for work performed in the next fiscal period in connection with a nonseverable task since the latter effort is viewed as an inseparable continuation of work to fulfill a need that arose during the appropriation's period of availability. (*GAO Report B-240264*)

A non-severable task, on the other hand, involves work which cannot be separated into components, but instead must be performed as a single task to meet a need of the government. See 60 Comp.Gen., *supra*. It follows, then, that the bona fide need rule does not preclude using time-limited funds for work performed in the next fiscal period in connection with a non-severable task, since

the later effort is viewed as an inseparable continuation of work to fulfill a need that arose during the appropriation's period of availability.

(GAO Report B-235678)

However, a need may arise in one fiscal year for services which, by their nature, cannot be separated for performance in separate fiscal years. *Id.* The question whether to charge the appropriation current on the date of contract award or to charge the appropriation current on the date the services are rendered turns on whether the services are "severable" or "nonseverable" (or "entire"). *Id.*; see 65 Comp. Gen. at 743. A severable service is one in which the government receives value as the service is rendered. A nonseverable or entire service is one in which the government receives value only when the entire service has been performed.

(GAO Report B-257977)

For service contracts, whether an expense was properly incurred or properly made during the period of availability depends upon whether the services are severable or nonseverable. A nonseverable contract is essentially a single undertaking that cannot be feasibly subdivided. B-240264, Feb. 7, 1994. It is considered a bona fide need of the fiscal year in which the agency entered into the contract. Consequently, agencies should record nonseverable service contracts as obligations at the time of award.

(GAO Report B-259274)

CONTRACT SERVICES COVERING A PART OF TWO FISCAL YEARS WHERE A CONTRACT FOR THE CULTIVATION AND PROTECTION OF A SPECIFIED NUMBER OF ACRES OF RUBBER-BEARING PLANTS AT A DEFINITE PRICE PER ACRE, PAYABLE UPON COMPLETION OF THE SERVICES, WAS ENTERED INTO DURING ONE FISCAL YEAR, AND THE SERVICES RENDERED THEREUNDER NECESSARILY COVERED THE CROP YEAR WHICH EXTENDED INTO THE NEXT FISCAL YEAR, THE ENTIRE CONTRACT PRICE SHOULD BE CHARGED TO THE FISCAL YEAR APPROPRIATION CURRENT AT THE TIME THE CONTRACT WAS MADE, RATHER THAN DIVIDED BETWEEN THE TWO FISCAL YEARS INVOLVED ON THE BASIS OF THE SERVICES ACTUALLY PERFORMED DURING EACH FISCAL YEAR.

(GAO Report B-37929)

Contracts that cannot be separated for performance by fiscal year may not be funded on an incremental basis without.

statutory authority, Such contracts, as "entire" or "nonseverable" under the bona fide need rule, are chargeable to the appropriation current at execution rather than funds current at the time goods or services are rendered.
(GAO Report B-241415)

3. *Nonseverable Services:*

- a. A service is nonseverable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years.
- b. For nonseverable contracts, the government must fund the entire effort with dollars available for obligation at the time the contract is executed, and the contract performance may cross fiscal years.
(79th Fiscal Law Course Deskbook, Chapter 3.IV.F.3.) [*hyperlink not available – document provided upon request*]

Requirements Contract

- A contract in which the government agrees to purchase all of its needs for the particular item or service during the contract period from the contractor, and the contractor agrees to fill all such needs, with deliveries or performance to be scheduled by placing orders with the contractor. It may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period. Obligations are not recorded until orders are placed.

CITATIONS:

A *requirements contract* is one in which the government agrees to purchase all of its needs for the particular item or service during the contract period from the contractor, and the contractor agrees to fill all such needs.

(*Principles of Federal Appropriations Act, Chapter 7.B.1.e.*)

(a) *Description.* A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor...

(b) *Application.*

(1) A requirements contract may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period.

(FAR 16.503)

...IS NOT A REQUIREMENTS CONTRACT WHICH DOES NOT OBLIGATE FUNDS UNDER SECTION 1311, SUPPLEMENTAL APPROPRIATION ACT, 1955, 31 U.S.C. 200, UNTIL ORDERS ARE ISSUED AGAINST THE CONTRACT.

(GAO Report B-144641)

B. Requirements or Indefinite Quantity Contracts.

1. Requirements contracts and indefinite quantity contracts also allow the contractual relationship to cross fiscal years. FAR Subpart 16.5.

2. Use of the Availability of Funds clause is mandatory. FAR 32.705-1.

3. The government obligates funds for each delivery order using funds available for obligation at the time the government issues the order.

(79th Fiscal Law Course Deskbook; Chapter 3.IX.B.3.) [hyperlink not available – document provided upon request]

Severable Service

- A service that can be separated into components that independently meet a need of the government. The services are continuing and recurring and, by definition, address needs of the time the services are rendered. To the extent a need for a specific portion of continuing or recurring services arises in a subsequent fiscal year, that portion is severable and chargeable to appropriations available in the subsequent year. Funding may not cross fiscal years unless authorized by statute, and agencies must fund severable service contracts with dollars available for obligation on the date the contractor performs the services.

CITATIONS:

Severable Services – Services that are continuing and recurring in nature, and that can be separated into components that independently meet a separate and ongoing need of the government. Common examples are court reporters, court interpreters, local area network and help desk support services, etc. To the extent that a need for a specific portion of a continuing service arises in a subsequent fiscal year, that portion is severable and chargeable to appropriations available in the subsequent FY. Generally, severable services must be charged to the fiscal year(s) in which they are rendered.

(*Uscourts.gov's JP3 Glossary of Terms*)

The determining factor for whether services are severable or entire is whether they represent a single undertaking. ///

However, where the services are continuing and recurring in nature, the contract is severable. Service contracts that are “severable” may not cross fiscal year lines unless authorized by statute...Most federal agencies have authority to enter into a 1-year severable service contract, beginning at any time during the fiscal year and extending into the next fiscal year, and to obligate the total amount of the contract to the appropriation current at the time the agency entered into the contract...Otherwise, the services must be charged to the fiscal year(s) in which they are rendered.

(Principles of Appropriation Law, Chapter 5.B.5.)

For service contracts, whether an expense was properly incurred or properly made during the period of availability depends upon whether the services are severable or nonseverable... Service contracts, where the services are continuing and recurring in nature, such as the vehicle maintenance contract here, are severable and are chargeable to the appropriation current at the time services are rendered. See 60 Comp. Gen. 219, 221 (1981). By definition, severable services address needs of the time the services are rendered.

(GAO Report B-259274)

Whether an agency should charge the full cost of contract services to the appropriation available on the date a contract for services is made or to the appropriation current at the time services are rendered depends upon whether the services are severable or entire. A task is severable if it can be separated into components that independently meet a separate need of the government. B-235678, above. Thus, to the extent a need for a specific portion of continuing or recurring services arises in a subsequent fiscal year, that portion is severable and chargeable to appropriations available in the subsequent year.

(GAO Report B-240264)

4. Severable Services:

a. A service is severable if it can be separated into components that independently meet a need of the government. The services are continuing and recurring in nature.

b. Severable services thus follow the general service contract Bona Fide Needs Rule, and are the bona fide need of the fiscal year in which performed. Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). Funding

of severable service contracts generally may not cross fiscal years, and agencies must fund severable service contracts with dollars available for obligation on the date the contractor performs the services.

(79th Fiscal Law Course Deskbook, Chapter 3.IV.F.4.) [hyperlink not available – document provided upon request]

**Severable Service
Crossing Fiscal
Years**

- If express authority exists in law, during the last year in which an appropriation is available for “new” obligations, agencies may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year. DoD and USCG may also use this authority for the purpose of leasing real or personal property, including the maintenance of such property when The lease of real or personal property. Funds made available for a fiscal year may be obligated for the total amount of a contract. Currently, NASA does not have this authority.

CITATIONS:

(a) Authority.—

(1) The Secretary of Defense, the Secretary of a military department, or the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may enter into a contract for a purpose described in paragraph (2) for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

(2) The purpose of a contract described in this paragraph is as follows:

(A) The procurement of severable services.

(B) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.

(b) Obligation of Funds.— Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a).

(10 U.S.C. § 2410a)

(a) Authority

The head of an executive agency may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

(b) Obligation of funds

Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a) of this section.

(41 U.S.C. § 253l)

(a) Applicability of subchapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration;

(41 U.S.C. § 252(a)(1))

(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 2410a and 41 U.S.C. 253l). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

(FAR 37.106)

Severable Test

- If a service contract is to be performed partially in one fiscal year and partially in the next and the contract is terminated at the end of the first fiscal year and is not renewed, what do you have? Three examples of applying the severability test are given in the Principles of Federal Appropriations Law: "In the case of a window-cleaning contract, you have half of your windows clean, a benefit that is not diminished by the fact that the other half is still dirty. What you paid for the first half has not been wasted. These services are clearly paid for the first half has not been wasted. These services are clearly severable. Now consider a contract to conduct a study and prepare a final report, as in 65 Comp. Gen. 741 (1986). If this contract is terminated halfway through, you essentially have nothing. The partial results of an incomplete study, while perhaps beneficial in some ethereal sense, do not do you very much good when what you needed was the complete study and report. Or suppose the contract is to repair a broken frammiss. If the repairs are not completed, certainly some work has been done but you still repairs are not completed, certainly some work has been done but you still don't have an operational frammiss. The latter two examples are nonseverable." A limitation of funds clause does not affect the applicable bona fide needs rule and the severable test.

CITATIONS:

...(subsequent modifications to Fish and Wildlife Service research work orders should be charged to the fiscal year current when the work orders were issued since the purpose of the research is to provide a final research report and the services under the contract are nonseverable). The last opinion is noteworthy because it pointed out that a limitation of funds clause does not affect the application of the *bona fide* needs rule and the severable test. 73 Comp. Gen. at 80. ///

Suppose further that the contract is terminated at the end of the first fiscal year and is not renewed. What do you have? In the case of a window-cleaning contract, you have half of your windows clean, a benefit that is not diminished by the fact that the other half is still dirty. What you paid for the first half has not been wasted. These services are clearly severable. Now consider a contract to conduct a study and prepare a final report, as in 65 Comp. Gen. 741 (1986). If this contract is terminated halfway through, you essentially have nothing. The partial results of an incomplete study, while perhaps beneficial in some ethereal sense, do not do you very much good when what you needed was the complete study and report. Or suppose the contract is to repair a broken frammiss.¹⁸ If the repairs are not completed, certainly some work has been done but you still don't have an operational frammiss. The latter two examples are nonseverable

(Principles of Appropriation Law, Chapter 5.B.5.)

Space Act Agreement	— A binding agreement entered into under the "other transaction" authority in the Space Act between NASA and another party ("Agreement Partner"). Space Act Agreements can be Reimbursable (NASA's costs are reimbursed for its unique goods, services, or facilities), Nonreimbursable (there is no exchange of funds), or Funded (appropriated funds are transferred to a domestic Agreement Partner to accomplish an Agency mission). Properly obligated budget authority remains obligated after the appropriation expires for liquidating the ordering agency's obligation as the performing agency completes the work (i.e., it does not have to be deobligated before the appropriation expires, like Economy Act obligations). However, as with other contractual obligations, once the agency liquidates the obligation, any remaining balances are subject to the original purpose and time limitations and are not available for new obligation after the account has expired. "Other transaction" authority is distinguished from contracts in law and by GAO and generally are not subject to federal laws and regulations applicable to procurement contracts.
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(NPR 9470.1)

CITATIONS:

Space Act Agreements (herein "Agreement(s)") entered into under the "other transaction" authority in the Space Act establish a set of legally enforceable promises between NASA and the other party to the Agreement (herein "Agreement Partner"). Such Agreements constitute Agency commitments of resources (including personnel, funding, services, equipment, expertise, information, or facilities) to accomplish stated objectives of a joint undertaking with an Agreement Partner... ///

The Space Act provides authority for Reimbursable, Nonreimbursable, and Funded Agreements. In this NPD, each type of Agreement is defined and differentiated by underlying principles, as follows, to ensure that each type of Agreement is effectively utilized and strategically managed:

a. Reimbursable Agreements are Agreements wherein NASA's costs associated with the undertaking are reimbursed by the Agreement Partner (in full or in part). NASA undertakes Reimbursable Agreements when it has unique goods, services, and facilities not being fully utilized to accomplish mission needs, which it can make available to others on a noninterference basis, consistent with the Agency's missions...

b. Nonreimbursable Agreements involve NASA and one or more Agreement Partners in a mutually beneficial activity that furthers the Agency's missions, wherein each party bears the cost of its participation, and there is no exchange of funds between the parties..

c. Funded Agreements are Agreements under which appropriated funds are transferred to a domestic Agreement Partner to accomplish an Agency mission...

(NPD 1050.1)

For our purposes here, while the Economy Act, like other interagency transaction authorities, requires the ordering agency to obligate its appropriation when it enters into an agreement with another federal agency, if the appropriation charged is a fiscal-year appropriation, the Economy Act requires the ordering agency to deobligate the appropriation at the end of the fiscal year to the extent that the performing agency has not performed. 31 U.S.C. § 1535(d). *See, e.g.*, 39 Comp. Gen. 317 (1959); 34 Comp. Gen. 418, 421-22 (1955). That requirement is specific to Economy Act transactions and does not apply to transactions governed by statutory authority other than the Economy Act.

(5) without regard to section 3324 (a) and (b) of title 31, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration.

(42 U.S.C. § 2473(c)(5))

(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.

(b) An advance of public money may be made only if it is authorized by...

(31 U.S.C. §3324)

An *other transaction* (OT) is a special vehicle used by federal agencies for obtaining or advancing research and development (R&D) or prototypes. An OT is not a contract, grant, or cooperative agreement, and there is no statutory or regulatory definition of “other transaction.” Only those agencies that have been provided OT authority may engage in other transactions. /// OT authority originated with the National Aeronautics and Space Administration (NASA) when the National Aeronautics and Space Act of 1958 was enacted... ///

Generally, the reason for creating OT authority is that the government needs to obtain leading-edge R&D (and prototypes) from commercial sources, but some companies (and other entities) are unwilling or unable to comply with the government’s procurement regulations.

(CRS Report for Congress: *Other Transaction (OT) Authority*)

Under the Competition in Contracting Act of 1984 and GAO’s Bid Protest Regulations, GAO will not review the issuance of Space Act agreements pursuant to agency’s “other transactions” authority, because the issuance of the Space Act agreements

pursuant to that authority was not tantamount to the award of contracts for the procurement of goods and services and was, therefore, outside GAO's bid protest jurisdiction. ///

"Space Act" agreements are issued by NASA under its "other transactions" authority pursuant to the National Aeronautics and Space Act of 1958 (the "Space Act"). 42 U.S.C. § 2473(c)(5) (2000). A "Funded Space Act Agreement" is "an agreement under which appropriated funds will be transferred to a domestic agreement partner to accomplish an Agency mission, but whose objective cannot be accomplished by the use of a contract, grant, or Chiles Act cooperative agreement." NASA Policy Directive, NPD 1050.1G, Nov. 13, 1998, at 1-2.

(GAO Report B-298804)

In April 2000, we reported on the Department of Defense's (DOD) use of Section 845 agreements, also referred to as "other transactions" for prototype projects. 1 These are transactions other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.

(GAO Report 03-150)
